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IN THE

Supreme Court of the United States

October Term, 1953.

No. 471.

FAMOUS ROGERS,
Petitioner,

v.

UNITED STATES LINES.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Page
1. The Contention That the Petterson Case Was Decided On Principles of Vicarious Liability Is Without Foundation	1
2. The "Relinquishment of Control" Doctrine	4
Conclusion	9

TABLE OF CASES CITED.

	Page
Alaska Steamship Company, Inc. v. Petterson, No. 287, October Term, 1953 — U. S. —, 98 L. Ed. Adv. p. 499	1, 4, 8
Carter v. Brown, 212 Fed. 393 (C. A. 5)	7
Lopez v. American-Hawaiian Steamship Co., 201 F. 2d 418	4
Mahnich v. Southern S. S. Co., 321 U. S. 96, 88 L. Ed. 561	2, 3
May v. Anderson, 345 U. S. 528, 97 L. Ed. Adv. p. 767	5
Mitchell v. The Etna, 43 F. S. 303 (D. C. Pa.)	7
Munson S. S. Lines v. Newman, 24 F. 2d 416 (C. A. 2)	7
The Osceola, 184 U. S. 175	2
Palazzolo v. Pan-Atlantic Steamship Corporation, 211 F. 2d 277 (C. A. 2)	7
Petterson v. Alaska S. S. Co., 205 F. 2d 478	1, 3, 4, 5, 7, 9
Pope and Talbot, Inc. v. Hawn, 346 U. S. 406, 98 L. Ed. Adv. p. 101	9
Rogers v. United States Lines, 205 F. 2d 57	4
Seas Shipping Co. v. Sieracki, 328 U. S. 85, 90 L. Ed. 1099	2, 6, 7, 8
Shields v. United States, 175 F. 2d 743	7

STATUTES CITED.

	Page
Jones Act, 46 U. S. C. A. Sec. 688	3
Longshoremen's and Harborworkers' Compensation Act, 3 U. S. C. 901, et seq.	9

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The primary basis for the present petition was the then existing conflict between the decision of the Court below and the decision of the Court of Appeals for the Ninth Circuit in *Petterson v. Alaska S. S. Co.*, 205 F. 2d 478. The existence of conflict was conceded by the Respondent in its original brief filed herein (p. 2) and the granting of certiorari was not opposed. This Court has now affirmed the *Petterson* case (*Alaska Steamship Company, Inc. v. Petterson*, No. 287, October Term, 1953 — U. S. —, 98 L. Ed. Adv. p. 499) and it is clear that the judgment below must be reversed upon the authority of that decision.

Respondent, recognizing the controlling effect of Petterson, and seeking some avenue of escape from its dilemma, sought and was granted leave to file an additional brief herein, *upon the representation that the shipowner in Petterson had made certain erroneous and inadvertent concessions* vitally affecting the outcome of the case. The opportunity to demonstrate these alleged erroneous concessions has now presented itself and passed: *Respondent's additional brief has been filed, without so much as a word about these alleged concessions, which somehow have now been forgotten.* It is evident from the contents of Respondent's brief that its principal objective is and has been, despite protestations to the contrary, simply to reargue the *Petterson* case, using the case at bar as the fulcrum for its arguments. The matters to be discussed herein will be confined to the highlights of the Additional Brief for Respondent.

1. The Contention That the Petterson Case Was Decided On Principles of Vicarious Liability Is Without Foundation.

Nothing so clearly demonstrates the proposition (advanced in our Petition for Certiorari) that the decision at bar was reached through an erroneous transposition of common law concepts into the maritime field as the conten-

tion being made by Respondent that the case at bar turns on principles of vicarious responsibility. In brief, Respondent asserts that the shipowner here is sought to be held liable for the negligence of the stevedore-employer, a result which cannot be reached under common-law theories of respondeat superior since the stevedore is an "independent contractor".[1] The fact is that we do not proceed upon any such theory, and it serves only to divert from the real issues to attempt to "lay low" a supposed contention which we have never made.

The basis of liability here being asserted is the breach of an *absolute, continuing and non-delegable duty:* the shipowner's obligation to "*supply and keep in order* the proper appliances appurtenant to the ship." *Mahnich v. Southern S. S. Co.,* 321 U. S. 96, 104, 88 L. Ed. 561, 567 (quoting from *The Osceola,* 184 U. S. 175). This is the essential character of the maritime obligation of seaworthiness. By concept and definition, it is an *absolute* duty and therefore cannot be measured by notions of due care on the one hand, or negligence on the other. *Seas Shipping Co. v. Sieracki,* 328 U. S. 85, 90 L. Ed. 1099. It is likewise *non-delegable* (*Seas Shipping Co. v. Sieracki, supra*) and therefore the obligation may not be evaded by attempting to delegate it to so-called "independent contractors". Thus it is that in imposing liability for breach of this duty it is not merely unnecessary, but anomalous, to resort to principles of vicarious liability. The shipowner is responsible *not* for the negligent act of another *but for his own direct breach of duty to provide seaworthy equipment and appliances.* That the stevedore's concurrent negligence may have contributed to the unseaworthy condition does not serve to insulate the shipowner from responsibility. On this point the decision of this Court in *Mahnich v. Southern S. S. Co., supra,* is decisive. In that case a seaman injured by reason of the

1. While we do not agree with Respondent's exposition of the common-law principles of vicarious liability, no purpose will be served in discussing them here.

collapse of a defective staging, proceeded against the shipowner under the theory of unseaworthiness. The cause of the accident was a defective rope, negligently supplied by the ship's mate.[2] The shipowner argued, inter alia, that the mate's negligence insulated the shipowner from liability for the unseaworthy condition thus created. This Court rejected the contention: "If the owner is liable for furnishing an unseaworthy appliance, even when he is not negligent, a fortiori his obligation is unaffected by the fact that the negligence of the officers of the vessel contributed to its unseaworthiness" (U. S. at p. 100). In brief, as in the *Petterson* case, *supra,* this Court, in effect, rejected the theory that principles of vicarious responsibility can in any way affect the shipowner's liability for breach of the obligation of seaworthiness. The shipowner here contends that because under common law principles of tort liability it may not be held responsible for the negligent acts of the stevedore, it should not be held liable at all. In doing so it simply ignores the basic nature of the warranty of seaworthiness, and fails or is unwilling to recognize that, as in the *Petterson* case, *supra,* the basis of liability here is not the negligence of the stevedore at all, but the *direct* breach of an *absolute* and *non-delegable* duty on the part of the shipowner. As in *Mahnich, supra* (at U. S. p. 103) "(the winch runner) was defective in the sense that it was inadequate for the purpose for which it was ordinarily used. . . . Its inadequacy rendered it unseaworthy *whether (the stevedore's) failure to observe the defect was negligent or unavoidable.*" (Emphasis and parenthetical matter supplied.) Liability for the breach of the obligation of seaworthiness cannot be avoided by attempting to delegate to others that which, under the maritime law, may not be delegated. This is the crux of the matter, and it is for this

2. The suit having been brought beyond the statutory period of limitations embodied in the Jones Act, 46 U. S. C. A. Sec. 688, the seaman could not avail himself of the mate's negligence as a basis for liability.

reason that it is of no consequence that the defective appliance was owned and incorporated into the ship's gear by the stevedore rather than by ship's crew. The shipowner's responsibility is to be gauged neither by the quality of the act which causes the unseaworthy condition, nor by the identity of the actor—both considerations are irrelevant in determining the shipowner's responsibility.

2. The "Relinquishment of Control" Doctrine.

In *Lopez v. American-Hawaiian Steamship Co.*, 201 F. 2d 418, the Court of Appeals for the Third Circuit squarely held that the shipowner's duty to provide longshoremen with a seaworthy vessel and a safe place to work "terminates at the time control is relinquished" to the stevedore.[3] It was expressly on the authority of the *Lopez* decision that recovery was denied by the Court of Appeals in the case at bar (*Rogers v. United States Lines*, 205 F. 2d 57, 58). It was made the basis of the decision below precisely because Respondent was able to persuade the Court that the case turned upon this erroneous proposition. The Court of Appeals for the Ninth Circuit, however, refused to adopt the relinquishment of control doctrine relied upon by the shipowner in *Petterson v. Alaska S. S. Co.*, 205 F. 2d 478, expressly rejecting the principle of the *Lopez* decision, and it was this conflict between the two circuits which formed one of the bases for granting certiorari in the *Petterson* case (see Mr. Justice Burton's dissenting opinion—*Alaska S. S. Co. v. Petterson, supra*, — U. S. —, 98 L. Ed. Adv. pp. 499, 501). The Court of Appeals having rejected the relinquishment of control theory in Petterson, and this Court having affirmed that decision, respondent would change its position completely and would now disclaim responsibility for its presence here, the contention now being that "the control doctrine is but a subsidiary issue in the

3. Counsel for the shipowner in *Lopez* is present counsel for Respondent.

case at bar". (Additional Brief for Respondent, page 18.) In brief, although this doctrine is in the case only because Respondent has succeeded in persuading the Court below to adopt it as its basis for decision, Respondent would now, because of the adverse holding in the *Petterson* case, prefer to justify the decision below upon some other footing.

That the common law "control" doctrine should have played no part in the decision at bar, we are in full accord. But the realities of the situation will hardly permit brushing aside the entire matter in such an easy fashion, for irrespective of the present views of counsel for Respondent, that doctrine is the keystone of the decision below, and is its sole justification. Were this not the fact, we would only too readily accept Respondent's present concession.

In our petition for Certiorari we had developed at some length the basic fallacy of this doctrine. We had pointed out the untenable nature of the contention, adopted by the Court below, that the unloading of cargo is primarily the stevedore's business and is of no real concern to the shipowner. For the stevedore is doing the ship's work on premises operated and controlled by the shipowner. There is no demise of the vessel. There can be no relinquishment of control to shoreside workers engaged to perform limited and transitory ship's work while the vessel is in port. The crux of the fallacy lies in the attempt to transpose problems involving the unique relation of shipowner and stevedore from their maritime context into unrelated shoreside relationship, and thus, by equation, to measure the scope and extent of maritime duties and responsibilities. Quite recently Mr. Justice Frankfurter, concurring in *May v. Anderson,* 345 U. S. 528, 97 L. Ed. Adv. pp. 767, 773, took issue with the type of judicial reasoning which would sanction the uncritical transposition of legal theories from one field of the law to another. Yet this is precisely the kind of approach which the Court below has pursued and which Respondent would perpetuate. Adequate though they may be in their proper setting, they cannot but result in substan-

tial impairment of rights when imposed upon maritime relationship. This type of thinking is dramatically exemplified by the attempt to test the shipowner's maritime responsibility for unseaworthiness by totally irrelevant common law principles of vicarious liability. It is exemplified by the attempt to equate the stevedore to the status of a common law "independent contractor". On page one of its Additional Brief, Respondent makes the unwarranted assertion that we "concede that Lavino, the stevedore, occupied the position which the law defines as independent contractor." No such concession was ever made by us in this or in any other case for the simple reason that the designation is anomalous. As this Court made it plain in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 90 L. Ed. 1099, Lavino occupies the status of an *intermediary employer*, which merely procures longshore labor for the benefit of the ship in connection with a phase of the ship's enterprise. His relation to the vessel, and that of his employees, is not to be confounded with the status of a common law independent contractor. It is undoubtedly this attempt to equate the two which motivates Respondent in making the kind of assertion which appears, for example, on page two of its Additional Brief, where it is stated that "when the use of the shoreside cranes was discontinued as the unloading operation neared its end, Lavino *wished* to continue to load into the two lines of freight cars." (Emphasis ours.) Are we to understand that Lavino had any choice in the matter, or that it could, if it had so desired, have unloaded cargo on the dock at the side of the ship? Or is it not an obvious fact that the necessities of the ship's business determined Lavino's conduct and compelled it to unload the cargo where it did? This kind of verbal gymnastic, by means of which the true relationship of Lavino to the vessel is sought to be distorted into the mold of "independent contractor", can hardly serve to assist this Court in rightly evaluating the situation at hand. It is clear that the arguments here advanced, under a somewhat different label,

have implicitly been rejected in the *Petterson* case, and that in effect it is merely a reargument of the *Petterson* issues.

As this Court pointed out in *Sieracki, supra,* longshoremen loading and unloading cargo are doing ship's work formerly done by the crew. In this function they obviously do not and cannot operate as an independent unit, under a law unto themselves, divorced from the enterprise of which they are an integral part. They are complementary to the crew and are necessarily integrated into the life of the ship and its activities. The stowage of cargo is the ship's business and the ship's responsibility, and the fact that improper stowage may be the fault of the stevedore who loads the vessel does not absolve the shipowner from responsibility. *Palazzolo v. Pan-Atlantic Steamship Corporation,* 211 F. 2d 277 (C. A. 2); *Munson S. S. Lines v. Newman,* 24 F. 2d 416 (C. A. 2); *Carter v. Brown,* 212 Fed. 393 (C. A. 5); *Mitchell v. The Etna,* 43 F. S. 303, 305 (D. C. Pa.). So, too, is the unloading of the vessel. In the very case at bar the record establishes that during the unloading of the vessel, the Master and officers are in command of the operation and never relinquish control of any part of the ship (R. 74a). During the work of unloading the Mate's authority is complete and he maintains supervision to protect the cargo, as well as the safety of the vessel and its personnel (R. 77a, 78a, 80a). The vessel provides the equipment needed to discharge cargo, including booms, winches and winch runners (R. 34a, 71a). It is the vessel who maintains the winch runners, and sees to it that they are greased, secured to the winches, and are of sufficient length (R. 71a). During the course of working cargo it is the traditional function of the ship's crew to maintain the winches in good running order. See *Shields v. United States,* 175 F. 2d 743. There is nothing in the unique status between stevedore and shipowner to justify the suggestion that the former is in any respect an independent entrepreneuer in the technical legal sense which Respondent would foist upon that relationship. In brief, the term "independent contractor", with all of

the implications contained therein, so far as common-law concepts are concerned, is meaningless in the context in which it is sought to be applied, and is neither the source nor the limit of the shipowner's absolute and non-de'egable warranty of seaworthiness.

The argument here being made by Respondent is rooted in the same philosophical thinking as motivated the shipowner in *Seas Shipping Company v. Sieracki, supra* (the decision upon which *Petterson* rests), only this time the argument appears in a somewhat different garb. There, the attack was formulated in terms of employees alleged to be "strangers" to the ship. Here, it is cast in terms of equipment sought to be viewed as a "stranger" to the ship, for Respondent contends that the crux of the case is who owned and who furnished the equipment. The catch words here are "independent contractor", "vicarious liability", and "relinquishment of control". That the term "independent contractor" has at times been loosely used by the Admiralty courts when not faced with the precise arguments here being advanced can hardly justify imposing upon the maritime status of a stevedore, engaged in unloading ship's cargo, common law attributes wholly foreign to his actual character and function in relation to the vessel's enterprise. In brief, his legal status in maritime affairs cannot be jelled into an artificial mold by common-law terminology indiscriminately applied. This Court's decision in *Alaska S. S. Co. v. Petterson, supra,* makes it abundantly clear that the rationale of *Sieracki supra* does not admit of the application of the kind of syllogistic reasoning which begins with a common-law premise and proceeds to a maritime conclusion. Here, as in *Sieracki,* the shipowner's liability is an incident of the maritime service rendered, not merely of the arid contractual arrangement as between shipowner, stevedore and longshoreman. The labor and equipment furnished by the stevedore are substitutes for ship's labor and ship's equipment. The shipowner may not escape his maritime obligations by contracting with an

intermediary employer for ship's labor; by the same token, he cannot escape his liability for faulty gear by contracting with a stevedore to substitute a piece of equipment, owned by the stevedore, for basic ship's gear.

One final word should be said of the argument Respondent makes to the effect that the *Petterson* case would nullify the Longshoremen's and Harborworkers' Compensation Act. This, too, is not a new approach. It was recently made to this Court in *Pope and Talbot, Inc. v. Hawn*, 346 U. S. 406, 98 L. Ed. Adv. p. 101, where the contention was rejected.

CONCLUSION.

We respectfully submit that the decision of this Court in *Alaska S. S. Co. v. Petterson, supra*, is dispositive of the issues here raised, and that on the basis of that decision the judgment below should be reversed.

Respectfully submitted,

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